Supreme Court, U. S.
FILED
AUG 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, et al.,

Respondents.

BRIEF OF AMICI CURIAE CONSUMER FEDERATION OF AMERICA, WOMEN'S EQUITY ACTION LEAGUE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND WOMEN'S LEGAL DEFENSE FUND

CHARLES E. HILL
A. BRYNNE MAYERSON
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

Attorneys for Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
ISSUES DISCUSSED BY AMICI . . .	3
CONTEXT AND SIGNIFICANCE OF ISSUES POSED	4
SUMMARY OF THE ARGUMENT	17
ARGUMENT	20
I. 18 U.S.C. § 1905 DOES NOT APPLY TO THE TYPE OF INFORMATION IN DISPUTE HERE AND, IN ANY EVENT, DISCLOSURE IS "AUTHORIZED BY LAW" WITHIN THE MEANING OF SECTION 1905	20
A. The Legislative History Of 18 U.S.C. § 1905 Clearly Demonstrates That The Equal Employment Information Here Does Not Fall Within The Scope Of That Section	21
B. Disclosure Of The Requested Information Is "Authorized By Law" Within The Meaning Of Section 1905	32

Page

1) Validly Adopted Agency Regulations Provide "Authorization By Law" For Disclosure Within The Meaning of Section 1905 33

2) 5 U.S.C. § 301 And Executive Order 11246 Each Provide Statutory Authority For The OFCC Disclosure Regulations 40

II. 18 U.S.C. § 1905 DOES NOT QUALIFY AS AN EXEMPTION 3 STATUTE AND THUS DOES NOT EXEMPT FROM DISCLOSURE INFORMATION WHICH WOULD OTHERWISE BE REQUIRED TO BE DISCLOSED UNDER THE FOIA 48

III. THE PROPER STANDARD OF JUDICIAL REVIEW IN REVERSE FOIA CASES IS WHETHER, BASED ON THE ADMINISTRATIVE RECORD, THE AGENCY'S DECISION WAS "ARBITRARY AND CAPRICIOUS" 59

CONCLUSION 72

APPENDIX A

APPENDIX B

TABLE OF AUTHORITIES

CASES:

Administrator, FAA v. Robertson, 422 U.S. 255 (1975) 51, 53

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 25

American Jewish Congress v. Kreps, No. 76-1559 (D.C. Cir., March 15, 1978) 53, 57, 58

Boske v. Comingore, 177 U.S. 459 (1900). 41

Camp v. Pitts, 411 U.S. 138 (1973). 67

Cass v. United States, 417 U.S. 72 (1974) 25

Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). . . . .13, 38, 42, 48, 50 . . . . . 52, 57, 62, 63

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 61, 62

City of Greenwood v. Peacock, 384 U.S. 808 (1966) 25

Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp 744 (D. Md. 1976) 14, 54

Crown Central Petroleum Corp. v. Kleppe, 13 FEP cases 1337 (W.D. Tenn. 1976) 65

Department of Air Force v. Rose, 425 U.S. 352 (1976) . . . 6, 7

EPA v. Mink, 410 U.S. 73 (1973). 6, 7

FCC v. Schreiber, 381 U.S. 279 (1965) 45, 46

Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957). 25, 31

General Dynamics Corp. v. Dunlop, 427 F. Supp 578 (E.D. Mo. 1976), vacated sub. nom. General Dynamics Corp. v. Marshall 572 F.2d 1211 (8th Cir. 1978). . . . . 13, 14 . . . . . .38, 42, 60, 65

General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969) 34

G. L. Christian & Associates v. United States, 320 F.2d 345 (U.S. Ct. Cl. 1963) 34

Grumman Aircraft Engineering Corp. v. The Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970) 57

GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F.Supp. 352(D. Del. 1977) 14

Huddleston v. United States, 415 U.S. 814 (1974) 22

Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974). 14

Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937). 47

Laughlin v. United States, 474 F.2d 444 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973) 33

M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972) 57

Maryland Casualty Co. v. United States, 251 U.S 342 (1920). 33

McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974) 65

Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D. D.C. 1976), cert. before judgment denied sub nom. Prudential Ins. Co. v. National Org. for Women, 97 S. Ct. 2198 (1977). 14, 65

Muniz v. Hoffman, 422 U.S. 454 (1975). . . . 25, 27, 28, 30, 31

National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943). 60

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), after remand, National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976). .15, 19 . . . . . 48, 51, 57

Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933). 45, 47

Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946) 46

Parkridge Hosp., Inc. v. Blue Cross & Blue Shield, 430 F. Supp. 1093 (E.D. Tenn. 1977), appeal pend., No. 77-1576 (6th Cir. June 7, 1977) 65

Paul v. United States, 371 U.S. 245 (1963). 33

Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976) 60

Public Utilities Commission of California v. United States, 355 U.S. 534 (1958) 33

Rewis v. United States, 401 U.S. 808 (1970). 22

Rodway v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). 33

Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. April 25, 1978) 35, 38, 42, 60

Sears, Roebuck & Co. v. GSA 384 F. Supp. 996 (D.D.C. 1974), stay dissolved, 409 F.2d 527 (D.D. Cir. 1974), aff'd, 402 F. Supp 378 (D.D.C. 1974), rev'd in part, aff'd in part and remanded, Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977). 13, 51, 54, 65

Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). . . . 60

Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673 (June 15, 1978). 17

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 45

Tidewater Oil Co. v. United States, 409 U.S. 151 (1972). . . . 25

Udall v. Tallman, 380 U.S. 1 (1964) 45

United States v. Bass, 404 U.S. 336 (1971). 22

United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963) 60

United States v. Cook, 384 U.S. 257 (1966) 25

United States v. Ryder, 110 U.S. 729 (1884). 24

University of California Regents v. Bakke, 47 U.S.L.W. 4896 (June 28, 1978) 12

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 6

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc. 46 U.S.L.W. 4301 (April 3, 1978) 67

Westinghouse Electric Corp. v. Brown, 443 F. Supp 1225 (E.D. Va. 1977). 54

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., 431 U.S. 924 1977) . . 12, 39, 48, 51, 54, 57, 59, 65

Yates v. United States, 354 U.S. 298 (1957) 22

STATUTES, EXECUTIVE ORDERS AND REGULATIONS:

Administrative Procedure Act, Ch. 324, 60 Stat. 238 (formerly codified at 5 U.S.C. § 1002 (1946) 5, 69, 70
5 U.S.C. § 701 et seq. (1976) 66
§ 706(2)(A)(1976). 9
. . . . . 16, 19, 39, 59, 61, 62

Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). 61

Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974 compilation). . . . 10, 11, 40, 44, 47

Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966), codified at 5 U.S.C. § 552 69
5 U.S.C. § 552(a)(4)(B)(1976) . . 68, 69
§ 552(b)(1976) 68
§ 552(b)(3)(1976). . . . 48-59
§ 552(b)(4)(1976). 50, 51, 53

Government in the Sunshine Act, Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (1976), codified at 5 U.S.C. § 552b 15, 51

5 U.S.C. § 301 (1966) . . 40, 42, 43, 44

15 U.S.C. § 176a (1940) 22, 23

15 U.S.C. § 176b (1940) 22, 23

18 U.S.C. § 216 (1940). . . . 22, 23, 24

18 U.S.C. § 1905 (1970) . . . . . passim

19 U.S.C. § 1335 (1940) 22, 23

28 U.S.C. § 1331 (1976) 61

Tariff Act of 1894, Ch. 349 § 34, 28 Stat. 509 34

Reconstruction Finance Corporation Act of 1932, 47 Stat. 5 (1932). 37

Act of June 25, 1948, Ch. 645, § 1905, 62 Stat. 683. 21

Revised Statutes of the United States § 161 (1st Ed. 1873-1874) 41

41 CFR Part 60-1.1. 10
60-1.7(a) 10
60-1.24 11
60-1.24(d). 11
60-1.40 10
60-2.1. 10
60-40 . . . . . 33, 63
60-40.1 et seq. 40, 47
60-60.4(d). 66
60-60.9 11

38 Fed. Reg. 3192 (February 2, 1976). 16

LEGISLATIVE MATERIALS:

7 Cong. Rec. 4005-06 (1878) 36

26 Cong. Rec. 6893 (1894) 35

94 Cong. Rec. 872 (1948). 27

104 Cong. Rec. 6550 (1958). 43

122 Cong. Rec. H 7867 (daily ed. July 28, 1976). 15

122 Cong. Rec. H 9260 (daily ed. August 31, 1976). 55

H. R. Rep. No. 304, 80th Cong., 1st Sess. (1947). 22, 27

H. R. Rep. No. 1461, 85th Cong., 2d Sess. (1958) 42

H. R. Rep. No. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Ad. News 2418 . . . . . 5, 54, 68, 70

H. R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972) 68

H. R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I (1976) (Comm. on Gov't. Operations) . .52, 57

H. R. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976) . . 15, 52, 53

S. Rep. No. 1620, 80th Cong., 2d Sess. (1948). 26

S. Rep. No. 1621, 85th Cong., 2d Sess. (1958). 42

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 5, 68, 70, 71

S. Rep. No. 1380, 89th Cong., 2d Sess. (1966). 32

S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974). 68

Business Record Exemption of the Freedom of Information

Act: Hearings Before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. (1977). . . . 17

Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977). 17

Hearings on Revision of Title 18 and 28 of the United States Code before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess. (1947). 30

MISCELLANEOUS GOVERNMENT MATERIAL:

41 Op. Att'y Gen. 166 (1953) . . 37 ,38

41 Op. Att'y Gen. 221 (1955) 36

ARTICLES AND TREATISES:

Barron, The Judicial Code 1948 Revision, 8 F.R.D. 439 (1949) . . . 31

Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Tex. L. Rev. 587 (1977). . . 21 43, 51, 60, 63, 69

K. Davis, Administrative Law of the Seventies (1976) 51, 57

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, et al.,

Respondents.

BRIEF OF AMICI CURIAE CONSUMER FEDERATION OF AMERICA, WOMEN'S EQUITY ACTION LEAGUE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND WOMEN'S LEGAL DEFENSE FUND

INTEREST OF AMICI CURIAE

With the consent of both parties, amici curiae Consumer Federation of America, Women's Equity Action League, Mexican American Legal Defense and Educational Fund and Women's Legal Defense Fund file this brief. A brief description of amici and of the nature of their interest in this litigation may be relevant to the Court's consideration of the issues raised by the parties.

Consumer Federation of America ("CFA"), which appeared as amicus curiae below, is the largest consumer organization in the United States, composed of over 220 national, state and local consumer organizations, representing over 30 million American consumers. As such, CFA has a vital interest in maximizing citizen access to government-held information, including information which documents the extent of private business compliance with the Nation's many consumer protection statutes.

Women's Equity Action League ("WEAL") is a nation-wide membership organization designed to promote greater economic progress for American women and to press for full enforcement of laws prohibiting sex discrimination. Women have traditionally been subjected to employment discrimination and are only now beginning to gain access to equal employment opportunity. Hence, the elimination of sex discrimination in employment is a matter of primary emphasis for WEAL.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is the only national organization in the country dedicated exclusively to the legal representation of the interests of Mexican Americans. Its constituency of six million persons of Mexican American descent is a group which has historically been victimized by racial discrimination in employment. Consequently, strict enforcement of equal employment opportunity requirements is particularly important to MALDEF.

Women's Legal Defense Fund ("WLDF") was organized with the express purpose of securing equal rights for women through the legal and legislative processes. One of WLDF's primary purposes is to oversee and evaluate private compliance with, and government enforcement of, the various federal equal employment programs.

As with CFA and the enforcement of the nation's consumer laws, WEAL, MALDEF and WLDF consider access to relevant information bearing upon the performance of federal contractors under Executive Order 11246 to be essential to their efforts to assess and monitor the effectiveness of governmental enforcement activity.

ISSUES DISCUSSED BY AMICI

1. Whether the equal employment information submitted to the government by contractors constitutes the type of information which Congress intended to encompass within 18 U.S.C. § 1905 and, assuming arguendo that this information is covered by § 1905, whether the Government is nevertheless "authorized," within the meaning of § 1905, to disclose this information.

2. Whether 18 U.S.C. § 1905 falls within exemption 3 of the Freedom of Information Act and thus excludes from the Act's mandatory disclosure requirements information which otherwise would be required to be released.

3. Whether a district court has authority to conduct a de novo review of an agency's determination to disclose information pursuant to a Freedom of Information Act request, or instead must review the agency's determination under the Administrative Procedure Act's "arbitrary and capricious" standard, on the basis of the agency's record.

CONTEXT AND SIGNIFICANCE OF ISSUES POSED

This case is representative of a new and flourishing type of litigation arising in connection with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the "reverse FOIA" suit in which private parties seek to prevent the government from releasing information to those who have requested it under the FOIA. Much of the information sought to be barred from public scrutiny is, as in this instance, collected by the government in an effort to enforce Congressional or Executive mandated regulatory programs. This Court's resolution of the issues presented in this case, therefore, will have a far reaching impact not only on the development and implementation of FOIA law but also upon the operations of those government regulatory programs which, depending on this Court's decision, may or may not be shielded from public view.

Before turning to the specific arguments amici intend to advance, it is appropriate to explore briefly the philosophy and framework of

the FOIA and to set forth what we believe to be the proper approach to be followed in resolving reverse FOIA issues. A discussion of the importance of public access to the type of information so often the subject of reverse FOIA litigation, and of the various protections against arbitrary government release afforded submitters, is also necessary in order to put in proper perspective Chrysler's portrayal of the decision below as bringing to an end the sanctity of confidential business information and ushering in an era of chaos and competitive harm for business submitters. 1/

1. Philosophy and framework of the FOIA. The FOIA was intended to implement a general philosophy of the "fullest responsible disclosure" of information in government files. 2/ Faced with a history of pervasive and indiscriminate government withholding of requested information, 3/ Congress amended the original public information section of the Administrative Procedure Act 4/ to ensure that it could no longer

1/ See, e.g., Brief of Petitioner Chrysler Corporation ("Chrysler's Brief") at 19-25.

2/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

3/ Id. at 4; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5, reprinted in [1966] U.S. Code Cong. & Ad. News 2418, 2421-22.

4/ Ch. 324, § 3, 60 Stat. 238 (1946).

be used as a means of perpetuating government secrecy. This Court has rightly characterized Congress' action as a sweeping revision "whose basic purpose reflects a 'general philosophy of full agency disclosure.'" Department of Air Force v. Rose, 425 U.S. 352, 360 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). 5/

While the FOIA clearly indicates Congress' commitment to the concept that maximum disclosure of government-held information will best serve the public interest, Congress at the same time recognized that in certain instances there are countervailing interests to this paramount policy of disclosure. To accommodate these other interests, Congress exempted from the mandatory disclosure provisions of the FOIA nine categories of information, including confidential business information. 6/ As this Court has stated, these exemptions are to be narrowly construed. 7/ When requested information

5/ See also EPA v. Mink, 410 U.S. 73, 80 (1973). ("Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view . . . .")

6/ 5 U.S.C. § 552(b)(4).

7/ Department of Air Force v. Rose, 425 U.S. at 361, citing Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

does fall within one of these nine narrow exemptions, the irrebutable presumption of openness yields to the countervailing interest expressed by the exemption. Then, the agency has the "option to keep [the information] confidential, if it so chooses." 8/ However, in exercising this option, discretion nevertheless to disclose exempt material is not unfettered; it may be restricted by statute or agency regulations, and in any event must be consistent with the bounds of agency discretion long recognized in our legal system. See discussion, infra, p. 16.

2. Analytic approach to reverse FOIA issues. As the numerous rather conflicting reverse FOIA decisions indicate, there is a need for guidance from this Court on a series of specific legal issues posed by an agency's decision to release to a requester material which it believes may be exempt from the mandatory disclosure provisions of the FOIA. There is also a need for guidance as to the analytical sequence which must be followed by an agency, and reviewed by a court, in the course of

8/ EPA v. Mink, 410 U.S. at 80; see also Department of Air Force v. Rose, 425 U.S. at 361.

Chrysler's extended treatment notwithstanding, Chrysler's Brief at 12-28, the FOIA itself does not provide a bar to disclosure of exempt information. See n.88 at p. 59, infra.

that disclosure decision. Amici submit that the following sequence is apparent from a consideration of the FOIA's terms.

First, the threshold question is whether the FOIA mandates disclosure. If none of the Act's nine exemptions apply, the agency, of course, must disclose the requested information. Second, if the FOIA does not require disclosure, i.e., if the information is covered by an exemption, the agency must still consider whether disclosure would serve the public interest. In doing so, the agency must first assure itself that disclosure is not barred by some other statute or applicable regulation. If no such statute or regulation exists, the agency must then properly consider all competing interests and strike the necessary balance envisioned by the FOIA between the policy of disclosure and any countervailing interest.

The court of appeals in Chrysler essentially endorsed this analytical approach to reverse FOIA issues. 9/ Moreover, in describing the judicial role in this process, the appellate court was careful to counsel against de novo review of the agency's various decisions, holding that review must be conducted under the "arbitrary and capricious" standard of the Admin-

9/ Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3rd Cir. 1977).

istrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). 10/

3. The public and private interests affected by disclosure. Chrysler attacks this view of the FOIA, characterizing it as stripping submitters of business information of the cloak of immunity from agency disclosure provided by that statute, and virtually leaving business submitters -- if not the nation's economy -- on the brink of disaster. Aside from narrower, erroneous legal arguments, Chrysler's position suffers from two major flaws. First, it misconceives the purpose of the FOIA, as it applies to the type of information in question here, and second, it seeks to obscure what is at issue in this particular case, as well as the substantial protections provided by the decision below.

At the core of Chrysler's contention that business information should be absolutely immune from disclosure is the theory that because the FOIA was enacted to increase the public's awareness of the workings of its government, it was not intended to provide access to merely private information. This distinction between private and government information, however, is largely superficial. As government takes on increasing responsibility for protecting members of the public against abuses experienced in the private sector, the public's "right to know" becomes commensurate with

10/ Id. at 1192-93.

its access to the submitter-generated information to which agency action or inaction relates. This case poses a perfect example. The Secretary of Labor is charged with enforcing Executive Order 11246 (as amended), 11/ which prohibits employment discrimination by companies with government contracts. It also requires contractors to take affirmative action to insure that applicants are hired, and that employees are treated during employment without regard to race, color, religion, sex or national origin. In order to monitor compliance with these requirements, regulations issued by the Secretary of Labor 12/ require all non-exempt government contractors to prepare and file EEO-1 reports containing data on the number of women and minorities employed, 13/ and Affirmative Action Programs ("AAPs"), 14/ providing information on past and projected employment of women and minorities. This information in part forms the basis for determining whether an individual contractor is in violation of the Executive Order. It may in turn be supplemented by investigatory material, obtained pursuant to regular compliance

11/ Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974 compilation).

12/ 41 C.F.R. §§ 60-1.1 et seq.

13/ 41 C.F.R. § 60-1.7(a).

14/ 41 C.F.R. §§ 60-1.40, 60-2.1.

reviews or special investigations by the Office of Federal Contract Compliance ("OFCC") within the Department of Labor, or by the individual agencies. 15/ When a determination of violation is made, after an opportunity for a formal hearing, the Order authorizes various sanctions, including contract suspension, cancellation, termination, and debarment from future contracts. 15a/ If the public is barred from access to the underlying data on which the decision to impose or not to impose these sanctions is based, it has no way of evaluating whether the Department of Labor is fulfilling its responsibilities under the Executive Order. Hence, contrary to Chrysler's implication that in this type of situation the only interest worthy of protection is the submitter's interest in confidentiality, this interest must be carefully balanced against both the paramount interest underlying the FOIA of opening the government to public scrutiny and the interest reflected in Executive Order 11246 in ensuring equal employment opportunity by government contractors.

The proper classification of submitter data as "public" or "private" information aside, amici also take issue with the parade of horrors conjured up by Chrysler as flowing from the court of appeals' decision. Chrysler paints its picture with broad strokes, talking about agency practices in general, 16/ confidential

15/ 41 C.F.R. §§60-60.9, 60-1.24(d).

15a/ 41 C.F.R. § 60-1.24.

16/ See, e.g., Chrysler's Brief at 78.

business information as if it were an undifferentiated mass, and the material which OFCCP sought to release here as if it were of the most sensitive nature. Surely there are types of business information coming into the hands of government agencies which, within the bounds of applicable legal standards, could not -- and should not -- be released. But this is not the case here. The two courts below, and the agency before them, were not presented with a request to release a guarded trade secret or new marketing or design strategies. Rather, the information at issue bears upon Chrysler's employment practices and its compliance with the established public policy of affirmative action to ensure equal employment opportunity. 17/ Moreover, despite what Chrysler might wish the Court to believe about the nature of the documents requested, it appears that only a small portion of those documents contained data which might conceivably be of interest to a competitor. 18/

17/ Cf. University of California Regents v. Bakke, 47 U.S.L.W. 4896 (June 28, 1978).

18/ After a full, and we submit improper, trial de novo the district court in large measure confirmed the preceding agency decision, finding that all but a very small portion of the information sought would cause Chrysler no substantial competitive harm if disclosed. Chrysler Corp. v. Schlesinger, No. 75-159 (D. Del., June 17, 1976), (footnote continued on page 13)

Chrysler's spectre of substantial competitive harm is further undermined by the fact that, despite Chrysler's repeated references to competitors as the primary seekers of business information under the FOIA, the requesters here were not business firms; 19/ nor have business firms been a significant source of reverse FOIA litigation. 20/

(footnote continued from page 12) reprinted with Chrysler's Petition for a Writ of Certiorari as App. B, at 49a.

19/ It is amici's understanding that the requesters were private citizens, concerned about Chrysler's efforts to meet its obligation to provide equal employment opportunity.

20/ In virtually all of these cases the requesters have been ordinary citizens or citizen groups working on behalf of consumers or minorities and women. See, e.g., Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1380 (D.C. Cir. 1977)(Council on Economic Priorities); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1194 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., 431 U.S. 924 (1977)(Concerned Workers, Council on Economic Priorities); Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 939 (D.C. Cir. 1975) (Boston's Commissioner of Assessment); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 580 (E.D. Mo. 1976), vacated sub nom. General Dynamics (footnote continued on page 14)

4. Protections accorded submitters. Finally, rather than focus upon the shortcomings of other agencies' procedures, review of the actions of the agency and the two courts below should be set in the context of the actual procedures for asserting and protecting claims for confidentiality provided to Chrysler in this instance. The OFCC procedures applicable here are discussed in some detail at pp. 63-68, infra. In addition to these procedures, and contrary to the bleak picture painted by Chrysler, the interpretation of the FOIA and 18 U.S.C. § 1905 adopted by the court of appeals also provides submitters with substantial protection against arbitrary agency disclosure of confidential business information.

(footnote continued from page 13) Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978)(Connecticut Women's Education and Legal Fund, Inc. and Treasurer of NAACP, San Diego Branch); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 154 (D.D.C. 1976), cert. before judgment denied sub nom. Prudential Ins. Co. v. National Org. for Women, 431 U.S. 924 (1977)(D.C. Chapter National Organization for Women); Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 746 (D. Md. 1976)(Mexican American Legal Defense and Educational Fund); GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352, 357 (D. Del. 1977) (Consumers Union of the United States); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 294 (C.D. Cal. 1974) (Los Angeles Chapter, National Organization for Women).

As set out above, an agency must first determine whether requested information is exempt under the FOIA. In the case of confidential business information, if the agency finds that disclosure of the requested information would cause "substantial competitive harm" 21/ to the submitter, the agency is precluded from disclosing unless it makes a determination that disclosure would, nevertheless, serve the public interest. If the information also falls within §1905, disclosure can only take place if it is "authorized by law." Moreover, that "authority," if not expressed in a statute, must be found in a validly enacted and openly arrived at agency regulation. Hence, in this case, it has been a clearly articulated policy of the

21/ National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767, 770 (D.C. Cir. 1974). Despite the fact that Chrysler did not seek the Court's review of the National Parks test, it argues now that the Court should overrule the great body of judicial opinion supporting that decision. Chrysler Brief at 20-21 n. 19. The other shortcomings of this tack aside, it overlooks Congress' endorsement of the National Parks' reading of exemption 4, when Congress adopted the identical exemption as part of the Government in the Sunshine Act, Pub. L. No. 94-409 (1976). See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 15 (1976) (Conf. Rep. on the Govt. in the Sunshine Act). See also 122 Cong. Rec. H7867 (daily ed. July 28, 1976).

Secretary of Labor to release the type of information here at issue since 1973, 22/ thus giving Chrysler a more than adequate opportunity to question the Secretary's policy and to otherwise protect its interests. As a final check against arbitrary agency action, any agency decision to disclose submitter-generated information, whether pursuant to the FOIA or an agency disclosure regulation, is subject to "abuse of discretion" judicial review under the APA, 5 U.S.C. § 706(2)(A). This standard of review -- applied generally with respect to all sorts of governmental action -- serves to assure submitters of business information that the agency applied the proper legal standards and considered all competing interests before making a decision to disclose. This is, we submit, all the protection that the FOIA or § 1905 requires, or that business firms legitimately need.

One final note of caution is appropriate. Time will tell whether submitters of confidential business information need additional protection from disclosure not presently provided for in the FOIA and § 1905. If, in attempting to rectify a past pattern of over-withholding by government agencies, a new pattern of over-disclosing emerges, Congress presumably will act to correct it. 23/ Although amici do not believe

22/ 38 Fed. Reg. 3192 (February 2, 1973).

23/ Indeed, Congressional committees are well aware of the general allegations (footnote continued on page 17)

this to be the case and submit that the present scheme gives due concern to all competing interests, Chrysler's cry for help in this forum would in any case be misplaced. As recently stated by the Court

> . . . in our constitutional system the commitment to the separation of powers is too fundamental for [this Court] to pre-empt congressional action by judicially decreeing what accords with "common-sense and the public weal." Our Constitution vests such responsibilities in the political Branches. Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673, 4684 (June 15, 1978).

SUMMARY OF THE ARGUMENT

This brief focuses in large part on the meaning and scope of 18 U.S.C. § 1905, and the relationship between that

(footnote continued from page 16)
of submitters, having held extensive hearings on the subject. See, e.g., Business Record Exemption of the Freedom of Information Act, Hearings Before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. (1977); Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).

statute and the FOIA. Amici also address the issue of the proper scope of judicial review in reverse FOIA cases.

An issue explicitly left open by the court of appeals, 24/ but one that is fundamental to any analysis of § 1905, is the intended scope of that statute. While the language of § 1905 might on its face be construed to include equal employment information, the legislative history of § 1905 conclusively demonstrates that Congress did not intend that section to apply to this type of information. Rather, the broad language of § 1905 stems from an unintended change in statutory language which occurred when Congress reenacted § 1905 as a consolidation of three prior non-disclosure statutes. This Court's decisions, and established principles of statutory construction which Congress has indicated should be applied to changes produced by statutory consolidation, mandate a narrow interpretation of § 1905 which preserves the intent of its predecessor statutes.

However, even if the Court were to find that this information falls within § 1905, that section does not bar the disclosure at issue in this case. Section 1905, by its terms, bars only those disclosures which are "not authorized by law." Amici demonstrate that validly adopted agency regulations

24/ Chrysler Corp., 565 F.2d at 1187 n. 73.

provide the "authority" required by § 1905 and that the regulations which authorized disclosure in this case were, as the court of appeals held, within the legal authority of the Secretary of Labor.

In hopes of obtaining protection from mandatory disclosure of commercial information broader than that provided by exemption 4 to the FOIA, as interpreted in the National Parks case, 25/ Chrysler argues that § 1905 is a specific "withholding" statute within the meaning of exemption 3 to the FOIA. An analysis of the interrelationship between § 1905 and the FOIA, however, mandates the conclusion that § 1905 can only be called into play when information is first found to fall within exemption 4. Any other reading would subsume and render meaningless the specifically provided protection for confidential business information contained in exemption 4. Moreover, § 1905's general prohibition against unauthorized disclosure of confidential business information does not satisfy the specific criteria set forth in exemption 3.

Finally, amici submit that the court of appeals correctly held that, absent a determination that agency fact-finding procedures were inadequate, the scope of judicial review in reverse FOIA cases is limited by the APA, 5 U.S.C. § 706(2)(A), to a determination on the basis of the agency record whether

25/ 498 F.2d 765, discussed supra p. 15 n. 21.

the agency's decision to disclose was "arbitrary and capricious, an abuse of agency discretion, or otherwise not in accordance with law." This conclusion is compelled by the reasoning underlying this Court's prior decisions on the proper scope of review under the APA, and is consistent with the policies clearly reflected in the FOIA.

ARGUMENT

I. 18 U.S.C. § 1905 DOES NOT APPLY TO THE TYPE OF INFORMATION IN DISPUTE HERE AND, IN ANY EVENT, DISCLOSURE IS "AUTHORIZED BY LAW" WITHIN THE MEANING OF § 1905.

18 U.S.C. § 1905 is a criminal statute which provides penal sanctions for the disclosure by government employees of certain types of information where such disclosure is "not authorized by law." 26/ In order to determine whether § 1905 prohibits disclosure of the equal employment opportunity information which the government sought to release in this case, this Court must first determine whether § 1905 was intended to encompass this type of information. Should the Court conclude that the information falls within § 1905's coverage, the Court must then determine whether the OFCC disclosure regulations would "authorize" the proposed disclosure, thereby rendering § 1905's prohibitions inapplicable.

26/ For the full text of 18 U.S.C. § 1905, see Appendix A at A-1, infra.

A. The Legislative History Of 18 U.S.C. § 1905 Clearly Demonstrates That The Equal Employment Information Here Does Not Fall Within The Scope Of That Section

It is at least arguable that certain of the equal employment opportunity data which are the subject of this litigation fall within the literal reach of § 1905. An analysis of § 1905's legislative history, however, clearly demonstrates that Congress never intended such a result. Rather, § 1905 was originally enacted in 1948 as a consolidation of three prior nondisclosure statutes contained in the Criminal Code, 27/ none of which would have covered the type of information at issue here. As this Court has held on numerous occasions in the past, absent clear Congressional intent to the contrary, the reach of a consolidated statute should be interpreted to extend no further than that of its predecessor statutes. This conclusion is reinforced

27/ See Act of June 25, 1948 ch. 645, § 1905, 62 Stat. 683, 791, codified at 18 U.S.C. § 1905.

For a thorough examination of the legislative history of § 1905, see generally Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Tex. L. Rev. 587, 606-613 (1977).

by another cardinal principle of statutory construction: Section 1905 is a criminal statute, and accordingly should be narrowly construed. 28/

Section 1905 represents a consolidation of three narrowly drafted and specific nondisclosure statutes that appeared in the 1940 edition of the United States Code: 29/ an income tax nondisclosure statute, 30/ a Tariff Commission nondisclosure statute 31/ and a Commerce Department nondisclosure statute 32/ (hereinafter collectively referred to as the "1940 nondisclosure statutes.")33/ The 1940 income tax nondisclosure statute prohibited the disclosure of the "amount or source of income, profits, losses, expenditures, or any particular thereof, set forth

28/ Huddleston v. United States, 415 U.S. 814, 831 (1974); Rewis v. United States, 401 U.S. 808, 812 (1970); United States v. Bass, 404 U.S. 336, 347 (1971); Yates v. United States, 354 U.S. 298, 304, 305, 310 (1957).

29/ See H.R. Rep. No. 304, 80th Cong., 1st Sess. A 127-A 128 (1947).

30/ 18 U.S.C. § 216 (1940).

31/ 19 U.S.C. § 1335 (1940).

32/ 15 U.S.C. § 176a and § 176b (1940).

33/ This terminology is adopted only to simplify the discussion, and should not obscure the fact that all three statutes were enacted prior to 1940.

or disclosed in any income return. . ." (Emphasis added.) 34/ Prior to 1948, the 1940 Tariff Commission nondisclosure statute 35/ prohibited the disclosure of trade secrets or processes embraced in any examination or investigation conducted by the Tariff Commission. Finally, the Commerce Department nondisclosure statute 36/ prohibited only the disclosure of statistical information furnished in confidence to the Bureau

34/ The full text of 18 U.S.C. § 216 (1940) is set forth in Appendix A at A-1, A-2, infra. It is clear from the face of the 1940 statute that § 216 applied only to tax-related information gathered by tax officials. Throughout the statute is the limitation that it applies only to information from an "income return." However, in the first phrase, which relates to "operations, style of work or apparatus of any manufacturer or producer," the prohibition is not expressly limited to tax officials. This omission apparently resulted from the inadvertent change in the language of § 216 in a 1926 codification which eliminated the reference to revenue officers and agents. See the full legislative history of § 216 set forth in Appendix B, infra.

35/ The full text of 19 U.S.C. § 1335 (1940) is set forth in Appendix A at A-2, A-3, infra.

36/ The full text of 15 U.S.C. §§ 176a and 176b (1940) is set forth in Appendix A at A-3, A-4, infra.

of Foreign and Domestic Commerce. Hence, the three statutes were narrowly focused on specific types of data collected in particular ways by three discrete agencies of the federal government. As such, there can be no doubt that § 1905's predecessor statutes would not have applied to the employment information submitted by Chrysler to DSA, wholly unrelated to the taxing function, or the specialized activities of these three agencies.

Despite the clearly limited scope of § 1905's predecessor statutes, Chrysler urges a literal interpretation of § 1905 that would extend the coverage of the consolidated statutes beyond recognition, to cover what the court of appeals termed "virtually every category of business information likely to be in the files of any federal agency." 37/ To permit such an expansion of prior law, without a clear indication of Congressional intent to do so, directly contradicts this Court's consistent holding that: "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed." United States v. Ryder, 110 U.S. 729, 740 (1884).

The general rule of statutory construction announced in Ryder has been specifically applied by this Court on several occasions in interpreting provisions of the 1948 codifications of

37/ Chrysler Corp., 565 F.2d at 1186.

both Title 18, the Criminal Code of which § 1905 is a part, and Title 28, the Judicial Code. 38/ In fact, this Court has repeatedly stated that it is now a "well-established principle governing the interpretation of provisions altered in the 1948 revision . . . that 'no change is to be presumed unless clearly expressed.'" 39/

The most thorough examination of the legislative history of the 1948 codification of the Criminal Code is provided in Muniz v. Hoffman, 422 U.S. 454 (1975). In that case, this Court held that, in recodifying § 11 of the Norris-

38/ See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Muniz v. Hoffman, 422 U.S. 454 (1975); Tidewater Oil Co. v. United States, 409 U.S. 151 (1972); United States v. Cook, 384 U.S. 257 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957). Cases involving revisions of the Judicial Code are relevant to the present case because of the parallel course followed in the revisions of the Criminal and Judicial Codes. See Muniz, 422 U.S. at 470, n. 10.

39/ Muniz, 422 U.S. at 474. See also Tidewater Oil Co., 409 U.S. at 162; Fourco Glass Co., 353 U.S. at 228. This general rule has also been applied to changes resulting from other codifications. See, e.g., Cass v. United States, 417 U.S. 72, 82 (1974).

LaGuardia Act 40/ as § 3692 of the Criminal Code (Title 18 of U.S.C.) Congress did not intend to extend the right to a jury trial to individuals accused of contempt under the Labor Management Relations Act, 41/ although § 3692 unambiguously granted such a right. Thus, this Court narrowed the reach of the 1948 codification, consistent with the scope of its predecessor statute. Relying on the House and Senate Reports to support the conclusion that Congress intended to preserve the original legislative intent underlying the statutes that were rearranged and codified into Title 18, Justice White stated:

> The revision of the Criminal Code was, . . . a massive undertaking, but, as the Senate Report on that legislation made clear "[t]he original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948). Nor is it arguable that there was any intent in the House to work a change in the understood applicability of § 11 in enacting § 3692. The House Report stated that "[r]evision, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation

40/ 29 U.S.C. § 111 (1946).

41/ 29 U.S.C. § 141 et seq. (1965).

> of conflicting laws, omission of superseded sections, and consolidation of similar provisions." H.R. Rep. No. 304, 80th Cong., 1st Sess. 2 (1947). 42/

The Court's opinion also emphasized that all revisions in the law were carefully explained in a series of Reviser's Notes printed in the House Report. 43/ The Reviser's Notes -- the only part of the legislative history of the 1948 codification statute bearing directly upon § 1905 44/ -- indicate a clear intent only to consolidate the three prior nondisclosure statutes. Nothing in the Reviser's Notes suggests that Congress intended in the process of consolidation to expand the scope of these statutes. Thus, the Notes state only that "[m]inor changes were made in translations and phraseology." 45/ As the Court observed in

42/ 422 U.S. at 468, 469. Similar language appears in the brief discussion of the 1948 codification statute in the Senate. See 94 Cong. Rec. 872 (1948) (remarks of Senator Wiley).

43/ The House Report states that "[t]he reviser's notes . . . explain in detail every change made in text." H.R. Rep. No. 304, supra at 9.

44/ Id. at A 127-A 128.

45/ The concerns expressed by Justice Stewart in his dissent in Muniz are not

(footnote continued on page 28)

Muniz, in light of the express intent in both the House and Senate Reports not to effectuate any change in substance in revising the Criminal Code, it "would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Reviser's Notes of that change." 46/

(footnote continued from page 27)
applicable here. In that case, Justice Stewart pointed out that the revisers did not say that § 3692 was intended to be a mere recodification of § 11 of the Norris-LaGuardia Act but rather that it was "based on" § 11. Justice Stewart contrasted this situation with that relating to the recodification of 18 U.S.C. § 403 dealing with contempts constituting crimes where, although also "based on" prior law, the revisers specifically noted that "'[i]n transferring these sections to this title and in consolidating them numerous changes of phraseology were necessary which do not, however, change their meaning.'" 422 U.S. at 484, 485. The revisers' comments on § 1905 are almost identical to their comments on § 403. In both, they indicate an unquestioned intent to consolidate and make changes in phraseology rather than substance.

46/ Muniz, 422 U.S. at 472.

Moreover, an interpretation of § 1905 in accordance with the intent of its predecessor statutes is supported by Congress' own perception of the role of the courts in dealing with changes produced by statutory consolidation generally, and Title 18 and 28 specifically. In the joint hearings held on the revisions of the Judicial and Criminal Codes, the Law Revision Counsel expressed Congress' assumption that the courts would rectify any unintentional changes created in the process of codification:

> There is one thing that I would like to point out . . . and that is the rule of statutory construction. In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not affect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> * * *
>
> It is clearly indicated in each of those revisers' notes [contained in the committee reports] whether any change was intended so that merely because we have changed the language -- we have changed the language to get a uniform style, to avoid

> awkward expression, to state a thing more concisely and succinctly -- but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law." Hearings on Revision of Title 18 and 28 of the United States Code before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947) (emphasis added). 47/

Hence, "[t]he nature of the revision process itself requires the courts, including this Court, to give particular force to the many express disavowals in the House and Senate Reports of any intent to effect

47/ Quoted with approval in Muniz, 422 U.S. at 472, 473:

> [T]his statement is particularly persuasive in view of the fact that its maker, Mr. Zinn, had served as Counsel to the Committee on Revision of the Laws for the previous eight years; the House Report on the revision of the Criminal Code pointed out that Mr. Zinn had, for that Committee, exercised close and constant supervision over the work of the revisers preparing the revision. 422 U.S. at 473 n. 11.

substantive changes in the law." Muniz, 422 U.S. at 472-473 n. 11. 48/

In sum, the legislative history of § 1905 indicates an intent only to consolidate three prior nondisclosure statutes and not to substantively alter their scope. None of these statutes was even arguably intended to encompass the employment information involved in this case. Under the principles frequently enunciated by this Court, both with respect to consolidations and the interpretation of criminal statutes, § 1905 must be read to preserve the original intent behind the 1940 nondisclosure statutes.

48/ See also Barron, The Judicial Code 1948 Revision, 8 F.R.D. 439, 445-446 (1949). In that article Mr. William W. Barron, the Chief Reviser of the Code, expressed this same view: ". . . no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised." Cited in Fourco Glass Co., 353 U.S. at 227 n. 8.

In 1966 when it codified Title 5, Government Organization and Employees, of the United States Code, Congress similarly indicated an expectation that the courts would correct any inadvertent changes in substance made in the process of codification:

(footnote continued on page 32)

B. Disclosure Of The Requested Information Is "Authorized By Law" Within The Meaning Of Section 1905

Even if the information at issue here were to fall within the scope of § 1905, disclosure would nevertheless not be barred by that section. Section 1905 does not provide for absolute nondisclosure of information coming within its reach, but by its terms specifically prohibits only disclosures that are "not authorized by law." The question in this case is whether agency regulations can provide the "authority" required by § 1905, and if so, whether the regulations which authorized disclosure here are within the legal authority of the Secretary of Labor. Amici submit that the court of appeals was correct in holding that the OFCC disclosure regulations "authorize" the release of

(footnote continued from page 31)

> It is sometimes feared or assumed that mere changes in terminology and style will result in changes in substance . . . The Committee wishes to express that in a codification statute, however, the courts uphold the contrary presumption: the statue is intended to remain substantively unchanged. S. Rep. No. 1380, 89th Cong., 2d Sess. 20-21 (1966).

the requested information within the meaning of § 1905. 49/

1) Validly Adopted Agency Regulations Provide "Authorization By Law" For Disclosure Within The Meaning of Section 1905

There can be no doubt -- and Chrysler does not contend otherwise -- that agency regulations reasonably adapted to the administration of a congressional act and not inconsistent with any statute, have "the force and effect of law." 50/ Rather, Chrysler contends that only another statute can provide "authority" within the meaning of § 1905 and that to allow an agency by validly issued regulations to provide such authority is to render § 1905's

49/ Chrysler Corp., 565 F.2d at 1186-1188.

The applicable regulations are contained in 41 C.F.R. Part 60-40, and generally provide for disclosure of this type of information.

50/ Paul v. United States, 371 U.S. 245, 255 (1963); Public Utilities Commission of California v. United States, 355 U.S. 534, 542 (1958); Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920); Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975); Laughlin v. United States, 474 F.2d 444, 453 n. 12 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973);

(footnote continued on page 34)

prohibition a nullity. Chrysler's Brief at 41-43. Chrysler's position, however, overlooks the fact that § 1905 was apparently directed at a narrow evil -- unauthorized disclosures by individual governmental employees having access to confidential information -- not at properly and openly arrived at agency disclosure decisions. Thus, it was not intended to bar the Secretary of Labor from disclosing equal employment data in the manner which has given rise to this litigation.

Contrary to Chrysler's assertion, the legislative history of § 1905 provides no real support for the proposition that Congress meant to prevent properly arrived at agency disclosure decisions. While the legislative history of the "authorized by law" provisions of § 1905's predecessor statutes is scant, as the Seventh Circuit has recently observed, the debates accompanying the reenactment of the income tax nondisclosure statute 51/ in the Tariff Act of 1894, 52/ reveal that

(footnote continued from page 33) General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); G.L. Christian & Associates v. United States, 320 F.2d 345, 350 (U.S. Ct. Cl. 1963).

51/ 18 U.S.C. § 216 (1940).

52/ Ch. 349, § 34, 28 Stat. 509.

> those who expressed concern about disclosure (rather than just the investigatory powers involved in the predecessor legislation) seemed to focus their concern not on regulated agency action, but rather on unwarranted and uncontrollable action by "poorly paid revenue agents." 26 Cong. Rec. 6893 (1894)(remarks of Senator Aldrich). 53/

Hence, what brief legislative history there is lends support to the proposition that § 1905 was intended to prevent individual government employees, for personal reasons or private gain, from taking it upon themselves secretly to disclose confidential information

53/ Sears, Roebuck & Co. v. Eckerd, No. 77-1417, slip op. at 8-9 (7th Cir. April 25, 1978). The only explicit reference to the nondisclosure provision was Senator Aldrich's statement that "another section [§ 63, containing the nondisclosure provision], forbids revenue agents to disclose business secrets, but that provision is valueless" 26 Cong. Rec. 6893 (1894). Chrysler relies on this remark to bolster its position. Chrysler's Brief at 42. This provision was intended to prohibit revenue agents from taking it upon themselves to reveal confidential information, however, and not to prevent agencies from promulgating disclosure regulations.

obtained through governmental processes. 54/

Moreover, contrary to Chrysler's assertion, interpretations of the "authorized by law" proviso of § 1905 in no sense "confirm that agency regulations do not constitute authorization by law within the meaning of § 1905." Chrysler's Brief at 45. First, the Opinion of the Attorney General relied on by Chrysler, 41 Op. Att'y General 221 (1955), explicitly leaves open the critical question whether § 1905 is applicable to "the official action of a department or agency

54/ Chrysler also argues that because § 3165 of the Revised Statutes of 1873 was specifically amended to add the language "or regulation authorized by law" to the existing "authorized by law" language, such specificity should also be required before regulations could be used to authorize disclosure under § 1905. Chrysler's Brief at 44-45. But an examination of the legislative debates, 7 Cong. Rec. 4005-06(1878), reveals that Congress added this language to § 3165 simply to make explicit the Commissioner of Internal Revenue's power to issue regulations authorizing revenue agents to give oaths, because a specific question was raised as to the Commissioner's authority to do so under prior law. A similar inquiry into agency authority is, of course, required here. But, as discussed below, the Secretary of Labor has ample authority
(footnote continued on page 37)

of the United States acting through its head." Id. at 223. 55/ More importantly, an earlier Attorney General's Opinion, 41 Op. Att'y Gen. 166 (1953), stands squarely for the proposition that agency disclosures are authorized within the meaning of § 1905 so long as the agency's authority to disclose can be reasonably implied from any applicable statute. In this opinion, the question was whether the Reconstruction Finance Corporation Act ("RFC Act"),56/ which was silent on the issue of disclosure, authorized the Secretary of the Treasury to disclose information allegedly falling within the scope of § 1905. The RFC Act conferred upon the Secretary of the Treasury broad authority, in the Attorney General's words, to "do all things necessary or appropriate to facilitate . . . orderly

(footnote continued from page 36)
to issue regulations authorizing disclosure of the requested documents.

55/ Moreover, the Attorney General quoted the agency disclosure regulations extensively without any mention that they might be in violation of § 1905. However, there was no need to rely on the regulations to authorize disclosure because the Attorney General expressed the view that the requisite authority resided in a separate statute. Thus, the Opinion hardly "confirms" Chrysler's position.

56/ 47 Stat. 5 (1932).

and efficient liquidation of the Corporation."41 Op. Att'y Gen. at 170. The Attorney General advised the Administrator that if, pursuant to this broad authority, he determined that disclosure would aid liquidation, the disclosure would be "authorized by law" and therefore not prohibited by § 1905. Amici submit that this decision strongly reinforces the notion that disclosures pursuant to validly issued agency regulations are not subject to § 1905. If the Administrator of RFC could disclose § 1905 information because he determined it would further the purposes of the RFC Act, then clearly an agency head can issue regulations providing for disclosure so long as the regulations are within his or her legal authority.

Finally, contrary to Chrysler's assertion that the Third Circuit stands alone in holding that validly adopted agency regulations provide "authority" within the meaning of § 1905, Chrysler's Brief at 46, every other Circuit which has considered this issue has reached the identical conclusion. 57/ Amici submit that these decisions are consistent with the legislative history

57/ See Sears, Roebuck & Co. v. Eckerd, slip op. at 6-9; General Dynamics Corp. v. Marshall, 572 F.2d at 1217; Charles River Park, 519 F.2d at 942-43. (Although the D.C. Circuit did not find the regulation in that case to "authorize" disclosure within the meaning of § 1905, by analyzing the (footnote continued on page 39)

of § 1905. Moreover, this approach does not render § 1905 meaningless or submitters of business information defenseless against irresponsible agency disclosure of sensitive business information. It simply assures that disclosure will take place on the basis of public regulations issued under open rulemaking procedures, pursuant to adequate statutory authorization. Resulting regulations, as well as any particular decision to disclose requested information, may be challenged by submitters as an abuse of discretion under the APA, 5 U.S.C. § 706(2)(A). At the same time, non-reviewable, extra-legal release of data, whether based on personal gain or an individual employee's sense of what is in the public interest, is rendered illegal. This reading of § 1905 hardly contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to "exculpate themselves merely by promulgating . . . regulations in justification of their conduct." Chrysler's Brief at 43, 44. Rather, this approach, with its notoriety and ample opportunity for public criticism and, where necessary, legal attack, is all that § 1905 requires.

(footnote continued from page 38) possible grants of authority for the regulation the Court appears to have acknowledged that validly issued regulations supply "authority" within the meaning of § 1905.) The Fourth Circuit in Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1190, did not reach this issue.

2) 5 U.S.C. § 301 And Executive Order 11246 Each Provide Statutory Authority For The OFCC Disclosure Regulations

Since validly adopted agency regulations provide the "authority" required by § 1905, and since the information requested in this case is clearly encompassed by the OFCC disclosure regulations, 58/ the sole question remaining is whether these regulations are within the legal authority of the Secretary of Labor. Both 5 U.S.C. § 301, "the housekeeping statute," and Executive Order 11246, as amended, are ample sources of authority for the Secretary's action. 59/

a. 5 U.S.C. § 301. The court below correctly held that § 301 provides authority for the OFCC disclosure regulations. 60/ Section 301 provides in pertinent part:

> The head of an Executive department or military department may prescribe

58/ 41 C.F.R. §§ 60-40.1 et seq.

59/ In light of the authority arising from § 301 and the Executive Order, amici see no need to discuss the possibility that the FOIA itself provides authority for disclosure regulations.

60/ Chrysler Corp., 565 F.2d at 1186-1188.

> regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

A predecessor of the housekeeping statute, section 161 of the Revised Statutes, 61/ was upheld as constitutional by this Court in Boske v. Comingore, 177 U.S. 459 (1900). In that case, the Court enunciated the following standard for judging the validity of administrative regulations promulgated under this statute:

> [A] regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress. Id. at 470.

61/ R.S. § 161 (1st ed. 1873-1874).

The regulations at issue here, designed to govern the custody and use of data collected in the enforcement of the Executive Order, appear clearly to fall within this broad rulemaking authority. The court of appeals so held, as have the two other most recent appellate decisions in reverse FOIA cases. 62/ Chrysler contends, however, that the last sentence of § 301, added through a 1958 amendment, indicates a congressional intent to preclude agencies from promulgating disclosure regulations which would authorize disclosure of information falling within § 1905. For support, Chrysler relies principally on the D.C. Circuit's opinion in Charles River Park, 519 F.2d at 942-43. We submit that this narrow reading of § 301 is without merit.

While the clear aim of the 1958 amendment was to prevent agencies from relying on § 301 to wrongfully withhold information, 63/ there were

62/ See Sears, Roebuck & Co. v. Eckerd, slip op. at 6, and General Dynamics Corp. v. Marshall, 572 F.2d at 1217 n. 6.

63/ As was the case with the original public information section of the APA, discussed infra p. 5, the housekeeping statute was used by agencies as colorable authority for the withholding of information. S. Rep. No. 1621, 85th Cong., 2d Sess. 3-4 (1958); H.R. Rep. No. 1461, 85th Cong., 2d (footnote continued on page 43)

fears expressed by several congressmen that the amendment would be misinterpreted to compel disclosure of information authorized to be withheld by other nondisclosure statutes. Accordingly, Congressman Moss, the sponsor of the amendment, explained that the amendment would not affect any statute other than the housekeeping statute, stating that "[the amendment] does not go to any other statutory authority which confers upon the . . . agencies . . . the right to withhold information . . . It does not affect the confidential status of information within the scope of § 1905." 64/ As the court of appeals observed, Chrysler's interpretation of Congressman Moss' remarks disregards the context in which the statement was made, as well as the evident purpose of the amendment. 65/ In summary, the

(footnote continued from page 42) Sess. 2 (1958). See Clement, supra at 621 n. 147. The debates on the amendment focused on this problem and did not address the issue of agency disclosure under § 301. Hence, the remark of Congressman Meader, cited by Chrysler at p. 49, represents an isolated comment and not the thrust of the debate on the purpose of the amendment.

64/ 104 Cong. Rec. 6550 (1958)(emphasis added).

65/ Chrysler Corp., 565 F.2d at 1187.

1958 amendment was added to assure that § 301 would not be used by agencies as colorable authority for withholding information. At the same time, Representative Moss simply took pains to indicate that the 1958 amendment itself was not meant to repeal § 1905. But the amendment in no way curtails preexisting agency authority under § 301 to promulgate disclosure regulations which, operating within the framework of § 1905, provide "authority" for disclosure.

b. Executive Order 11246. Although explicitly left open by the court of appeals, 66/ Executive Order 11246, as amended, provides a separate source of authority for the regulations at issue in this case. Executive Order 11246 establishes a national policy to prevent employment discrimination in private businesses contracting with the federal government. Section 201 confers broad authority on the Secretary of Labor to "adopt such rules and regulations as he deems necessary and appropriate to achieve the[se] purposes . . ."

This Court's prior decisions lend firm support to the proposition that § 301 confers upon the Secretary of Labor the authority to promulgate regulations providing for public disclosure of information gathered in an effort to enforce the Executive

---

66/ Chrysler Corp., 565 F.2d at 1188.

Order. 67/ For example, in FCC v. Schreiber, 381 U.S. 279 (1965), the question was whether the FCC had authority to promulgate regulations requiring public disclosure of information obtained in the course of an investigation, unless the FCC's presiding officer found that the public interest would be served by nondisclosure. This Court held that § 4(j) of the Communications Act of 1934, 68/ which empowers the FCC to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice," authorized the public disclosure of information "as the agency may determine to be proper upon a balancing of the public and private interests involved." 69/ In so doing,

---

67/ Grants of agency authority comparable in scope have been held to authorize issuance of disclosure regulations. See FCC v. Schreiber, 381 U.S. 279, 289-94 (1965); Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933) (forbidding disclosure). See also Thorpe v. Housing Authority, 393 U.S. 268, 280-81 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1964).

68/ 47 U.S.C. § 154(j)(1976).

69/ FCC v. Schreiber, 381 U.S. at 292. Particularly relevant is this Court's holding that even if the information in question was deemed to contain confidential data or trade secrets, the regulation authorizing disclosure was

(footnote continued on page 46)

this Court stated that so long as the rule is not exercised arbitrarily, it "may not be impeached merely because reasonable minds differ on the wisdom [of it]." 70/ In support of its conclusion, the Court's opinion noted that the Commission had determined that disclosure would serve

> to inform those segments of the public primarily affected by the agency's regulatory policies and those likely to be affected by subsequent administrative . . . action of the factual basis for any action ultimately taken -- a practical inducement to public acceptance of the results of the investigation.
> 381 U.S. at 294.

Similarly, access to the equal employment information which the government seeks to disclose in this instance will inform those "primarily affected" by the Executive Order of the basis for any subsequent action or inaction taken by the Secretary. Moreover, the vigilance of members

(footnote continued from page 45) nevertheless valid because it required a balancing of the private interest in confidentiality and the public interest in disclosure. Id. at 299.

70/ Id. at 292, citing Oklahoma Press Co. v. Walling, 327 U.S. 186, (footnote continued on page 47)

of the public who have a strong interest in halting race and sex discrimination in employment practices, and educated decisions by representatives and officials of local government who have legal responsibility in the field, would clearly be a helpful asset to the government in enforcing the laws which prohibit such practices. Thus, the Secretary's determination that this information should be disclosed was well within the scope of his authority under the Executive Order. 71/

(footnote continued from page 46) 215-218 (1946); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 146 (1937); Norwegian Nitrogen Co. v. United States, 288 U.S. at 321-22.

71/ Chrysler's argument that "the routine reference to the Executive Order does not conceal the fact, as the rules themselves state, that the purpose of the regulation is to implement . . . the Freedom of Information Act," Chrysler's Brief at 54, chooses to ignore the explicit reference in the very same section to the "policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment . . ." 41 C.F.R. § 60-40.1. (Emphasis added.) Hence, the regulations expressly indicate that the purpose of disclosure (footnote continued on page 48)

II. 18 U.S.C. § 1905 DOES NOT QUALIFY AS AN EXEMPTION 3 STATUTE AND THUS DOES NOT EXEMPT FROM DISCLOSURE INFORMATION WHICH WOULD OTHERWISE BE REQUIRED TO BE DISCLOSED UNDER THE FOIA.

Even the reverse FOIA decisions most favorable to Chrysler's view of § 1905 have held that it only comes into play with respect to material found to be exempt from mandatory disclosure under exemption 4 of the FOIA. 72/ However, in an effort to avoid the National Parks test of "substantial competitive harm" under exemption 4, 73/ (and in hopes that this Court will disregard the arguments advanced above concerning the applicability here of § 1905), Chrysler argues that § 1905 qualifies as an exemption 3 statute. As such, Chrysler asserts, a test of confidentiality under § 1905 stricter than that of exemption 4 operates as an independent bar to the

(footnote continued from page 47)
is to further the ends of the Executive Order.

72/ See, e.g., the Fourth Circuit's decision in Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1204 n.38, 1207, where the court held that § 1905 and the FOIA's exemption 4 are coextensive in scope. See also Charles River Park, 519 F.2d at 941-942 n.7.

73/ See discussion supra at 15 n. 21.

government's effort to disclose equal employment opportunity data.

Amici join Chrysler in urging this Court to resolve the exemption 3 question. 74/ Before turning to the more technical analysis of exemption 3's terms, however, amici submit that an examination of the relationship between § 1905 and the FOIA itself reveals that, irrespective of the exact wording of exemption 3, § 1905 cannot function as an independent bar to disclosure under the FOIA. This conclusion is based on the simple, common sense need to read two separate statutes in a fashion that preserves a role for each and that accords a proper respect to Congress' deliberations leading to the passage of the FOIA.

Section 1905, on its face, constitutes a general prohibition against unauthorized disclosure of confidential commercial or financial information. Since exemption 4 of the FOIA deals specifically with this type of information, if the material sought does not fall within exemption 4, the FOIA should be read not only to "authorize,"

74/ Even if this Court agrees with the view that § 1905 is only applicable to material within exemption 4, thus rendering the question of whether § 1905 functions independently as a bar to disclosure under exemption 3 of little practical import, a final resolution of this issue by this Court
(footnote continued on page 50)

but actually to require, its disclosure. 75/ In short, the only rational way to reconcile § 1905 with the FOIA is first to consider whether the information in question falls within the protection from mandatory disclosure provided by exemption 4 and, if it does, only then to turn to an analysis of § 1905. To treat § 1905 as yet another FOIA exemption for commercial information renders a nullity Congress' carefully crafted protection for confidential commercial information contained in exemption 4. Moreover, the interpretation of the interrelationship of § 1905 and exemption 4 urged by amici does not strip § 1905 of any mission of its own. To the extent that disclosure is not mandated under the FOIA, § 1905 stands as a check, through its "authorized by law" caveat, on the agency's discretion to disclose. See discussion at pp. 32-40, supra.

(footnote continued from page 49)
will remove unnecessary confusion and lead the way to a clear and consistent approach to reverse FOIA cases.

75/ It begs the question to argue that, in assessing the authority provided by the FOIA, one must treat § 1905 as an exemption 3 statute. Because of § 1905's qualification, unless "authorized by law," such an approach simply leads to a circular process whereby each statute unsuccessfully seeks to determine its applicability from the other. See Charles River Park,
(footnote continued on page 51)

This interpretation of the relationship between § 1905 and exemption 4 gains support from the recent legislative history of exemption 3. That exemption originally covered documents "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3)(1970). Congress amended exemption 3 in 1976 to conform to its sister provision in the Government in the Sunshine Act, 76/ and to expressly overrule this Court's decision in Administrator, FAA v. Robertson, 422 U.S. 255 (1975). In the initial legislative action leading to that amendment, the House Government Operations Committee considered the interrelationship of the FOIA and § 1905 and concluded:

> [T]he Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise

(footnote continued from page 50)
519 F.2d at 941-942 n. 7; National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 686-687 (D.C. Cir. 1976). Accord, Clement, supra, at 617 n. 129; K. Davis, Administrative Law of the Seventies § 3A.18 at 88, 89 (1976). But see Sears, Roebuck & Co. v. GSA, 553 F.2d at 1384-1385; Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1215.

76/ Pub.L.No. 94-409, § 3(a), 90 Stat. 1241 (1976) codified at 5 U.S.C. § 552b.

> required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. Part I at 23 (1976).

This same Report went on to state:

> . . . on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. Charles River Park "A", Inc. v. Dept. of Housing and Urban Development, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975). 77/

77/ Id. Amici are aware that the final version of exemption 3 was rewritten in conference, H.R. Rep. No. 1441, 94th Cong., 2d Sess. 8 (1976). However, the quoted passages are nevertheless quite germane to an understanding of the relationship between the FOIA and §1905. First, the difference between the final version of exemption 3 and that proposed by the House Committee on Government Operations is irrelevant for
(footnote continued on page 53)

Even when considered independently of exemption 4, § 1905 simply does not qualify as an exemption 3 statute under the 1976 amendment. In Administrator, FAA v. Robertson, 422 U.S. at 264, 265, this Court based its decision in part on the conclusion that the FOIA was not intended to repeal prior nondisclosure statutes. Congress subsequently amended exemption 3 with the explicit purpose of "overrul[ing] the decision of the Supreme Court in . . . Robertson . . . ." H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (conference report). 78/ While this

(footnote continued from page 52)
this purpose because the Committee's interpretation was not tied to any particular wording of exemption 3, but rather was based on the relationship between § 1905 and the FOIA itself. Second, those later considering exemption 3, including the conferees, never contradict these statements, although one would have expected expressions of disagreement given the notoriety of the issue. Cf. American Jewish Congress v. Kreps, No. 76-1559, slip op. at 10 n. 36 (D.C. Cir. March 15, 1978)(". . . the report of that committee [House Committee on Government Operations] is not an inappropriate tool for divination of the interest of the Congress as a whole, especially since each House had an opportunity to object to interpretations contained in that report.")

78/ We are frankly puzzled by Chrysler's reliance on Robertson, Westinghouse
(footnote continued on page 54)

Court may have felt bound by the legislative history of the original exemption 3 which indicated an intent that the FOIA not affect the applicability of the "nearly 100 statutes . . . which restrict public access to specific Government records . . .", 79/

(footnote continued from page 53) Electric Corporation v. Schlesinger, and Sears, Roebuck & Co. v. GSA, as well as the amendment to exemption 3 itself, for the proposition that prior decisions holding that § 1905 did not qualify as an exemption 3 statute under the original version of exemption 3 "too narrowly construed the third exemption," Chrysler's Brief at 57. Chrysler simply ignores the fact that the express purpose of the amendment was to narrow the exemption and to overrule Robertson. Because Westinghouse relied extensively on Robertson, the continued validity of the Westinghouse holding on this issue has been questioned even within the Fourth Circuit. See Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 753 (D. Md. 1976); Westinghouse Elec. Corp. v. Brown, 443 F. Supp. 1225, 1232-1233 (E.D. Va. 1977).

79/ H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2427, reprinted in [1966] U.S. Code Cong. & Ad. News 2418.

Also, the interpretation of § 1905 urged by amici here would not in fact constitute a major departure from that statute's mode of operation, (footnote continued on page 55)

the 1976 amendment makes absolutely clear that certain of these pre-existing nondisclosure statutes do not exempt material under the FOIA.

Rather than set forth those statutes which would or would not fall under the amended exemption 3, Congress carefully set forth standards governing the types of statutes which would qualify, limiting exemption 3 to any statute which "(A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 80/ Applying these standards to § 1905, it cannot be interpreted as a barrier to the release of information under exemption 3.

Subsection (A) of exemption 3 does not allow for any decisionmaking at the administrative level. It incorporates only those statutes which evidence a congressional mandate of confidentiality that is "absolute and without exception." 81/ By its express terms, § 1905

(footnote continued from page 54) because § 1905, unlike other statutes referred to in the House Report, has always been tied to other laws which "authorize" disclosure.

80/ 5 U.S.C. § 552(b)(3).

81/ 122 Cong. Rec. No. H9260 (daily ed. Aug. 31, 1976)(remarks of Representative Abzug).

does not absolutely bar disclosure of information falling within its scope, but rather, prohibits only those disclosures made "in any manner or to any extent not authorized by law." As discussed above, at pp. 33-40, validly enacted agency regulations "authorize" disclosure of information falling within § 1905 and, in any case, even Chrysler would presumably concede that another statute granting explicit discretion to disclose would fall within § 1905's qualifying language. Hence, § 1905 does leave some discretion on the issue of disclosure to the agency and therefore cannot qualify as an exemption 3 statute under subsection (A).

Chrysler also relies upon the second part of exemption 3. 82/ We submit, however, that a statute should be deemed to qualify under subsection (B) only if it evidences a congressional determination that specific documents must be kept confidential, or at least provides a precise test that the administrator can apply to determine whether release would pose the dangers

82/ Section 1905 clearly does not call into play the first part of subsection (B) -- a statute containing particular criteria for withholding. Section 1905 provides no criteria for withholding and Chrysler does not contend otherwise. Chrysler's Brief at 58.

contemplated by Congress. It is critical to note that § 1905 on its face is a "statute of general applicability and not one that specifically defines or categorizes the information" falling within its scope, 83/ much less provides a ready test for determining applicability. 84/

We base our conclusion in part on the thorough analysis of the 1976 amendment to exemption 3 contained in the D.C. Circuit's opinion in American Jewish Congress v. Kreps, No. 76-1559 (D.C. Cir. March 15, 1978). There the court emphasized the unmistakable purpose of the amendment "to assure that basic policy decisions on government secrecy be made by the Legislative rather than the Executive Branch," 85/ and accordingly held that at a minimum

83/ National Parks, 547 F.2d at 686, citing Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 580 n.5 (1970); see also K. Davis, Administrative Law of the Seventies § 2A.18 at 88, 89 (§ 1905 not within exemption 3), citing M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 469-70 (D.D.C. 1972).

84/ Cf. Westinghouse Electric Corporation, 542 F.2d at 1204, 1207, and Charles River Park, 519 F.2d at 941, which have looked to exemption 4 as a guide to § 1905's reach.

85/ American Jewish Congress, slip op. at 9, citing H.R. Rep. No. 880, Pt. 1, 94th Cong., 2d Sess. 23 (1976).

an exemption 3 statute must contain a "formula" so that the administrator can be assured of fulfilling Congress' mandate. On this basis, the court concluded that the statute involved in that case 86/ did not qualify as an exemption 3 statute

> . . . if for no other reason than that the agency had the power radically to expand the quantity and diversity of information in its files to intercept matter of a sort that Congress well might not have contemplated when considering the need for confidentiality. 87/

Similarly, the mere fact that § 1905, read literally, would apply to "virtually every category of business information likely to be in the files of any federal agency," dispels the contention that § 1905 represents a congressional determination of the advisability of secrecy for "any particular types of matters." When § 1905 was codified in 1948, Congress clearly did not envision the types of information which are the subject of this litigation. Indeed, the ever increasing and changing types of business information in the files of federal agencies, and the control by the agencies themselves over the precise information

86/ Section 7(c) of the Export Administration Act, 50 U.S.C. App. § 2406(c) (1970).

87/ American Jewish Congress, slip op. at 14-15.

which must be submitted, demonstrates that Congress has not engaged in the crucial determination under subsection (B) that "particular types of matter" falling within the literal reach of § 1905 must be protected against disclosure. Hence, § 1905 is precisely the type of statute which Congress intended to remove from the ambit of exemption 3 when it amended that provision in 1976.

III. THE PROPER STANDARD OF JUDICIAL REVIEW IN REVERSE FOIA CASES IS WHETHER, BASED ON THE ADMINISTRATIVE RECORD, THE AGENCY'S DECISION WAS "ARBITRARY AND CAPRICIOUS"

The court of appeals was correct in holding that the scope of judicial review in reverse FOIA cases is limited by 5 U.S.C. § 706(2)(A) to a determination on the basis of the agency record whether the agency's decision to disclose the requested information was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 88/ This conclusion is mandated by the reasoning of

88/ Chrysler Corp., 565 F.2d at 1192-93. Chrysler argues to the contrary that de novo review is warranted, relying in part upon Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1205-1216, which held that de novo review was appropriate in reverse FOIA cases because an implied cause of action exists under either the FOIA or § 1905. These argu-

(footnote continued on page 60)

this Court's opinions on the proper scope of review under the Administrative Procedure Act, and the clearly expressed policies of the FOIA.

(footnote continued from page 59)
ments have been thoroughly discussed and properly rejected both by the court of appeals below and by the other courts of appeals addressing reverse FOIA issues. See Sears, Roebuck & Co. v. Eckerd, slip op. at 12; General Dynamics, 572 F.2d at 1217, 1218; Pennzoil Co. v. FPC, 534 F.2d 627, 631 (5th Cir. 1976). For a thorough discussion of an implied § 1905 cause of action, see Sears, Roebuck & Co. v. Eckerd, slip op. at 10-12; and, generally, Clement, supra, at 624-626.

Moreover, this Court has frequently held that de novo review of agency decisionmaking is unavailable in the absence of Congressionally created standards and procedures for judicial review. See United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963); National Broadcasting Co. Inc., v. United States, 319 U.S. 190 (1943); Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). Hence, even if a cause of action could be implied under § 1905 or the FOIA, neither of those statutes provides standards and procedures for review of an agency's decision to disclose requested information. Accordingly, the APA "abuse of discretion" standard of review would still be applicable. Compare the court of appeals' discussion of a possible cause of action and de novo review under the Declaratory
(footnote continued on page 61)

Since Congress did not explicitly anticipate reverse FOIA actions, the Act is silent as to the proper scope of review in these cases. Absent an express provision for judicial review, a reverse FOIA lawsuit brought under the APA must be governed by § 706(2)(A), the APA scope of review provision. According to this Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), de novo review is proper under § 702(2)(A) in only two limited circumstances:

> First, when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate. . . . And, . . . when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

(footnote continued from page 60)
Judgment Act, 28 U.S.C. § 2201, rejected, inter alia, because it would "transfer primary decisional responsibility for agency disclosure from the administrative agencies to the federal courts . . ." 565 F.2d at 1191. In sum, given jurisdiction under 28 U.S.C. § 1331, and the applicability of the APA, we cannot imagine any reason to distinguish reverse FOIA agency decisions from any other type of agency decision in which the APA's standard of review governs.

Neither of these two circumstances was present in this case. 89/

An agency's determination to comply with a requester's FOIA request is adjudicatory in nature and a submitter's action to enjoin disclosure is clearly not a "proceeding to enforce nonadjudicatory agency action." Hence,

89/ In Charles River Park, 519 F.2d at 940-941 n. 4, the D.C. Circuit held that Overton Park is inapposite to a district court's inquiry into the applicability of the FOIA exemptions because the inquiry does not constitute judicial review of agency action, but merely represents a threshold determination whether submitters have a cause of action. Chrysler embraces this holding and tries to extend it across the range of decisions arising in a reverse FOIA case, partially on the basis of a claim that no "discretion is involved in agencies' decisions to disclose." Chrysler Brief at 70, 71. But however the question is framed, what is at issue is still an agency decision, at least in part based on factual determinations. If that decision is wrong as a matter of law, then of course it must be overruled but that does not alter the appropriateness of § 706(2)(A)'s test.

Moreover, as one observer noted, "[s]ince the FOIA exemptions are permissive . . . district courts cannot determine that submitters have a cause of action merely by finding the

(footnote continued on page 63)

de novo review is justified in reverse FOIA lawsuits only if the agency factfinding procedures on which the disclosure decision was based are inadequate. 90/

The factfinding procedures in this case were not inadequate; nor is the regulatory framework "inherently" inadequate as Chrysler contends. 91/ Chrysler's Brief at 72-81. In assessing Chrysler's claim, several points should be kept in mind. First, OFCC's disclosure regulations, 41 C.F.R. Part 60-40, have been the law since 1973. Therefore, Chrysler and other government contractors have long known of the risk of FOIA requests for their affirmative action submissions

(footnote continued from page 62)
exemptions applicable. Agencies have discretion to disclose exempt information to the extent permitted by other laws. Therefore, despite the court's analysis in Charles River Park, a district court inquiring into the applicability of the FOIA exemptions engages in judicial review of an agency determination, which the APA governs." Clement, supra, at 631 n. 206.

90/ This prohibition against de novo review forbids both a trial de novo (i.e., taking of testimony on the submitter's claim of substantial competitive injury) and review de novo (reviewing the agency's decision afresh, rather than by the abuse of discretion standard).

91/ The district court did not hold otherwise. Chrysler Corp., 565 F.2d at 1179.

and have had ample time to consider the legal and factual arguments relevant to a claim that disclosure should not be made. Second, the data in question here are highly repetitive and quite standardized: EEO-1's, AAP's and investigatory material bearing on employment practices. Thus, contrary to Chrysler's implications, neither the burden of developing legal and factual arguments regarding alleged confidentiality, nor the level of sophistication or technical expertise needed to assess those arguments, is particularly substantial. 92/ Moreover, whatever the practices of different agencies at different times, Chrysler was provided immediate notice of the requests here. 93/ And Chrysler certainly

92/ In fact, given the nature of the information, it is likely that OFCC has over the years validly developed a view regarding the harm which release of this type of information could cause. It is hard to imagine that competitive impact would vary widely from industry to industry.

93/ Chrysler Corp., 565 F.2d at 1179. Accordingly, Chrysler's assertion that "neither the FOIA nor most agency regulations require that notice be provided . . . and, in practice, many agencies often do not provide such notice," Chrysler's Brief at 78, is irrelevant. In any event, a review of the reported cases reveals that in most instances the submitter has in fact
(footnote continued on page 65)

availed itself of the opportunity to object, contending, inter alia, that the information was exempt from disclosure under the FOIA and that disclosure of certain information was prohibited by § 1905 and the Department of Labor's disclosure regulations. And the decision to release the documents was only made after the agency concluded that it had "fully considered" Chrysler's arguments. 94/ Hence, the district court was not presented with any issues not considered in the administrative process.

(footnote continued from page 64)
received prompt notice that a request for information has been made and has been given an ample opportunity to respond. See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d at 1196; Parkridge Hosp. Inc. v. Blue Cross and Blue Shield, 430 F. Supp. 1093, 1095 (E.D. Tenn. 1977), appeal pend., No. 77-1576 (6th Cir. June 7, 1977); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 580 (E.D. Mo. 1976); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. at 154; Crown Central Petroleum Corp. v. Kleppe, 13 FEP Cases 1337, 1338 (W.D. Tenn. 1976); McCoy v. Weinberger, 386 F. Supp. 504, 506 (W.D. Ky. 1974); Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996, 999 (D.D.C. 1974).

94/ Chrysler Corp., 565 F.2d at 1179.

In addition to the actual procedures followed upon receipt of the FOIA request here, 41 C.F.R. § 60-60.4(d) also provides that the employment information which Chrysler is required to submit may be claimed to be confidential and non-disclosable at the time it is submitted. The regulation provides for a determination of a submitter's confidentiality claims by the receiving agency within ten days, and an appeal to the Director of OFCCP which also must be decided in ten days. The decision of the Director is a final agency decision, reviewable under 5 U.S.C. §§ 701 et seq. 95/ Chrysler contends, however, that it would place an unreasonable burden on submitters to object to disclosure of information at the time it is submitted. Chrysler's Brief at 75 n. 83. But, as indicated above, the burden with respect to this affirmative action information is in fact not great. Indeed, under the circumstances it would appear that Chrysler could easily prepare a document setting forth its claims of confidentiality which could be routinely attached to each submission. 96/

95/ Chrysler Corp. v. Schlesinger, No. 75-159 (D. Del., June 17, 1976), Chrysler's Petition, App. B. at 56a.

96/ Chrysler Corp., 565 F.2d at 1179. The Third Circuit also held that the agency record did not sufficiently explain the basis of the agency
(footnote continued on page 67)

Finally, Chrysler complains that the procedures provided are inadequate, because of limits in the ability to provide testimonial evidence and to cross-examine government experts. Chrysler Brief at 78. But as this Court recently held in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 46 U.S.L.W. 4301 (April 3, 1978), agency selection of the procedures to be followed in the course of reaching governmental decisions should be accorded substantial deference by the courts, at least when minimal safeguards are provided. Chrysler cannot seriously contend that expert testimony and cross-examination fall within the minimal safeguards required of the government before it can release affirmative action information.

(footnote continued from page 66)
decision to disclose the requested information, and remanded the case to the agency for a further explanation. Without commenting on the court's determination that the agency record was inadequate, amici endorse the use of the rule announced by this Court in Camp v. Pitts, 411 U.S. 138, 142-43 (1973):

> If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing, but as contemplated by Overton Park, to obtain from the agency either through affidavits or

(footnote continued on page 68)

For all these reasons, the Third Circuit correctly held that the district court's de novo review of the agency decision to disclose the employment information submitted by Chrysler was improper. 97/

This limited availability of de novo review is also consistent with the congressional intent underlying the FOIA. Congress urged courts and agencies to "emphasize the fullest responsible disclosure" when balancing the interests of confidentiality against the public's right to know. Congress also indicated its intent, recently reiterated in the 1974 FOIA Amendments, that the courts should expedite FOIA cases "in every way." 98/ Permitting courts to review de novo an agency's decision to disclose requested information would compromise these ob-

---

(footnote continued from page 67)
testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

97/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12, reprinted in [1966] U.S. Code Cong. & Ad. News, 2418, 2429; H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 3, 11, 14, 17 (1972); S. Rep. No. 93-854, 93rd Cong., 2d Sess. 1 (1974).

98/ 5 U.S.C. § 552(a)(4)(D).

jectives and would divert judicial time and resources to consideration of issues which Congress intended to be decided by the agencies.

Although the above analysis results in a different standard of review of agency decisions for requesters (de novo under 5 U.S.C. § 552(a)(4)(B)), and submitters, this result is fully warranted by the legislative history of the FOIA. 99/ Congress passed the FOIA in 1966 100/ because agencies were using the original public information section of the Administrative Procedure Act 101/as colorable authority for wrongfully denying requests for information. As noted in the Senate Report accompanying the FOIA:

> It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect; it is cited as statutory authority for the

---

99/ See generally Clement, supra, at 630-31.

100/ Pub. L. No. 89-554, 80 Stat. 383 (1966).

101/ Ch. 324, § 3, 60 Stat. 238 (1946).

> withholding of virtually any piece of information that an official or any agency does not wish to disclose. S. Rep. No. 813, 89th Cong., 1st Sess. 4 (1965).

Similarly, the House Report concluded:

> Section 3 of the Administrative Procedure Act (5 U.S.C. 1002), though titled "Public Information" and clearly intended for that purpose, has been used as an authority for withholding rather than disclosing, information . . . For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 has been documented. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5, reprinted in [1966] U.S. Code Cong. & Ad. News 2418, 2421-22.

As one means of rectifying this pervasive pattern of wrongful agency withholding of information, and of implementing the underlying policy of the "fullest responsible disclosure," 102/ Congress specifically provided for de

102/ S. Rep. No. 813, supra, at 3 (1965).

novo judicial review of an agency's denial of an FOIA request. The Senate report referred to this right of requesters to de novo review as "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and to prevent it from becoming meaningless judicial sanctioning of agency discretion." 103/

Hence, the legislative history of the FOIA makes it clear that de novo review was provided as a protection for requesters against over-withholding of information by agencies. The poor track record of agency disclosure convinced Congress that de novo review of an agency's decision to withhold documents was necessary to counterbalance agency tendencies to refuse disclosure. Judicial creation of a comparable right of de novo review for submitters would not only be contrary to the legislative scheme envisioned by Congress, but could serve to undermine this specifically created incentive for agencies to disclose rather than withhold requested information -- a result inimical to Congress' strongly expressed commitment to disclosure as the chief policy of the FOIA. Under the circumstances, a decision to alter the situation should reside with Congress, not with the courts.

103/ S. Rep. No. 813, supra, at 8 (1965).

CONCLUSION

For the reasons set forth above, the court of appeals' decision should be upheld.

Respectfully submitted,

Charles E. Hill

A. Brynne Mayerson

600 New Jersey
Avenue, N.W.
Washington, DC 20001
(202) 624-8390

Attorneys for Amici
Curiae */

August, 1978

*/ This brief was prepared with the assistance of Kathryn Russell, a third year Georgetown University Law Center student.

APPENDICES

APPENDIX A

18 U.S.C. § 1905:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 216 (1940):

Disclosing operations of manufacturers, and income-tax returns.

It shall be unlawful for any collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided

by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

19 U.S.C. § 1335 (1940):

Penalty for disclosure of trade secrets.

It shall be unlawful for any member of the commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartner-

ship, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be published by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment.

15 U.S.C. § 176a (1940):

Information furnished in confidence; disclosure prohibited. -- Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual corporation, or firm furnishing such data.

15 U.S.C. § 176b (1940):

Penalty. -- Any employee of the Bureau of Foreign and Domestic Commerce violating any of the provisions of this Act [§ 176a of this title] shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000 or imprisoned not exceeding one year, or both.

APPENDIX B

THE LEGISLATIVE HISTORY OF 18 U.S.C. § 216, § 1905's PRIMARY PREDECESSOR STATUTE.

Amici submit that the narrow focus of 18 U.S.C. § 216 upon information gathered in connection with the taxation process is clearly demonstrated by the following facts relating to § 216's legislative history and that of the statutes which gave rise to it.

1. The first non-disclosure statute in the line of statutes culminating in 18 U.S.C. § 216 appeared in the Internal Revenue Law of 1864, Act of June 30, 1864, ch. 173, § 38, 13 Stat. 238, and reads as follows:

> Provided, That if any [assessor, or assistant assessor, or any collector or deputy collector, revenue agent or inspector] shall divulge to any party, or make known in any manner other than is provided in this act, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of official duties, he shall be subject to the penalties prescribed in section thirty-five [thirty-six] of this act. (Emphasis added.)

2. Section 38 of the Internal Revenue Law went through successive codifications and reenactments in sub-

stantially the same form until 1894. See Revised Statutes of the United States (Laws in Force, December 1, 1873) § 3167, 18 Stat. (pt. 1) 607 (609); Act of March 1, 1879, ch. 125, § 2, 20 Stat. 329. By the Act of August 27, 1894, ch. 349, § 34, 28 Stat. 557, this section, bearing the number § 3167, was amended to include the prohibition on disclosure of sources of income, profits, losses and similar information originating in income tax returns. As a result of this addition, § 3167 read substantially the same as § 216.

3. Section 3167 was successively reenacted in various revenue acts passed by Congress until 1926. See Act of October 3, 1913, ch. 16, § II, 38 Stat. 177; Act of September 8, 1916, ch. 463, § 16, 39 Stat. 773; Revenue Act of 1918, Feb. 24, 1919, ch. 18, § 1317, 40 Stat. 1146; Revenue Act of 1921, ch. 136, § 1311, 42 Stat. 331; Revenue Act of 1924, ch. 234, § 1018, 43 Stat. 345; Revenue Act of 1962, ch. 27, § 1115, 44 Stat. 117.

4. In 1926, the first official restatement and codification of United States law since 1878 was published as "The Code of Laws of the United States of America of General and Permanent Character in Force December 7, 1925," Act of June 30, 1926, ch. 712, 44 Stat. (pt. 1) 1. It was in this codification that § 216 first appears in the Criminal Code, placed under the chapter dealing with "Offenses Relating to Official Duties." Before 1926, the laws from which § 216 was derived appeared exclusively among

the Internal Revenue laws and were totally absent from the Criminal Code. 1/

It should be noted that in the initial portion of this first version of § 216, reference to revenue officers and agents, as such, had been eliminated by the substitution of the terminology "any clerk, or other officer or employee of the United States . . . ." But see Point 6 below. At the same time, § 3167 of the Internal Revenue Code (Title 26) was separated into two sections, section 62 and section 1025, the former dealing exclusively with disclosure of information by revenue officials relating to "operations, style of work or apparatus" and the latter dealing with disclosure by such officials of information from income tax returns.

5. Amici could find no legislative history of the 1926 codification which could shed light on the reasons for placing substantially the same provision both in the Criminal Code and in the Internal Revenue laws. It clearly appears, however, that the intent of the codification was to remain true to the meaning of existing law, not to revise it. Thus, the Preface to the

---

1/ As an illustration, refer to U.S. Compiled Statutes, 1918, an unofficial compilation of U.S. laws. In the Criminal Code of that edition under Chapter heading "Offenses Related to Official Duties," there is no reference to a provision like § 216.

1926 codification states: "No new law is enacted and no law repealed." This guiding principle is repeated in the Statement of the Compilers, found in H. Rep. No. 900, 69th Cong., 1st Sess. at 3 (1926), which notes:

> It is desired to emphasize the fact that the work, being a compilation, contains all the existing law, and that care has been taken not to depart from the language of the original enactments. (Emphasis added.)

Given this aim and mandate of the 1926 codification, amici submit that any application of the prohibition on disclosure contained in § 216 to non-tax areas would be without legislative authority. 2/

6. This conclusion is further reinforced by the legislative history immediately subsequent to the 1926 codification. Congress in 1928 authorized the "preparation of supplements to the code with perfecting amendments," to correct errors discovered in the codification. P.L. No. 621, ch. 910, 45 Stat. 1007 (1928). The 1928 supplement

---

2/ It is also relevant to note that the two earlier, unperfected efforts at codification did not contain the equivalent of § 216 under the criminal (denominated "penal") provisions. See

(footnote continued on page B-5)

amended each of the relevant statutes here, 18 U.S.C. 216, and 26 U.S.C. § 62 and § 1025, rendering them absolutely identical. In so doing, the notes to each tax section expressly stated that the "same provision constitutes" § 216 and the other tax provision. Moreover, corrections to § 216 in the supplement, in particular the insertion of "collector, deputy collector, agent," 3/ are attributed to the unintended omission of these words from the earlier version, although the notes state that § 62 and § 1025, "which are duplicates of this section, show the omitted words." The proclaimed identity of these sections eliminates

---

(footnote continued from page B-4)
H.R. 9389, 66th Cong., 1st Sess. (1919) and H.R. 12, 67th Cong., 1st Sess. (1922). Moreover, the Justice Department indicated its satisfaction with the completeness of the criminal provisions of H.R. 12. In responding to a solicitation of its views on H.R. 12, the Department of Justice, W.C. Herron for the Attorney General, wrote:

> The sections which relate in any way to the criminal law or criminal procedure have been carefully examined, and, so far as it is possible to discover from such examination, no errors or omissions have been noted. H. Rept. No. 2, 68th Cong., 1st Sess. 29 (1923).

3/ See point 4 on B-2 above.

any possible argument that Congress intended § 216 to reach more broadly than § 62 and § 1025, to information concerning "operations, style of work or apparatus" originating outside the taxation function.

7. While § 216 remained unaltered, the internal revenue sections went through another change. In 1932, § 62 and § 1025 were renumbered § 55(f) and § 1828(a)(1), with the former being limited (as in the 1926 codification prior to the 1928 supplement) to information obtained from income tax returns and the latter applying to "operations, style of work or apparatus." Act of June 6, 1932, ch. 209 § 55, 47 Stat. 189. To date, these provisions have remained unchanged in substance, although they have been renumbered again as § 7213(a)(1) and § 7213(b) of Title 26. 4/

4/ It should be noted that each provision, as with § 1905, applies by its terms to "any officer or employee of the United States," without limitation to internal revenue officials.

To avoid confusion, the note which accompanies § 216 in the 1940 edition of U.S.C. may require some explanation. It states:

REPEALED

Insofar as this section related exclusively to internal revenue it was repealed and incorporated as §§ 55(f)(1), 4047(a)(1) of

(footnote continued on page B-7)

8. In summary, the legislative history of § 216 provides no indication of a Congressional intent to broaden the early tax non-disclosure statutes to cover the sort of commercial or financial data which are the subject of this litigation. Indeed, all indications are clearly to the contrary. Any doubt on this point should be finally resolved by a review of an opinion of the Attorney General on the subject, issued in 1937, in response to a request from the Chairman of the Social Security Board. 39 Op. Att. Gen. 1 (1937). The Social Security

---

(footnote continued from page B-6)

Title 26, Internal Revenue Code. See Section 4(a) of enacting sections of the Internal Revenue Code preceeding Subtitle A of Title 26.

Failure to repeal § 216 in light of this note might be thought to support the argument that, despite the absence of any explanatory legislative history, § 216 was indeed meant to extend beyond the reach of § 55(f) and § 4074(a)(1) of Title 26, U.S.C. Perusal of the cross-reference § 4 of the 1939 Internal Revenue Code (Act of February 10, 1939, ch. 2, 53 Stat. 1-504), however, particularly the provisions of § 4(e), indicate quite clearly that § 216 was not repealed because it covered the act of publicizing illegally disclosed taxation information, a matter which does not relate "exclusively to internal revenue . . . ." (note to § 216).

Board sought the Attorney General's opinion on whether it would be a violation of 18 U.S.C. § 216 for the Board to release certain forms, required to be filed by the Social Security Act, to state unemployment compensation authorities who requested the information in the forms for administration of their unemployment compensation laws. In response, the Attorney General stated:

> It has been suggested that section 3167 of the Revised Statutes, as amended (U.S.C. Title 18, sec. 216), is such a prohibiting statute, but I do not so construe that section. Insofar as here pertinent, it relates only to income tax returns; and Form SS-5, when filled out and filed by an employee, is not an income tax return. Moreover, it is a penal statute and must be construed strictly. Its evident purpose is to prohibit the divulging of information connected with a taxpayer's private business and affairs, which information the taxpayer is required to furnish on his income tax returns, and the divulging of which might be a source of annoyance, embarrassment, or injury to the taxpayer. (Emphasis supplied.) 39 Op. Att. Gen. at 2.

The failure of the Attorney General even to consider the possibility that § 216 extended to information covering employers' "operations" or "style of work" originating outside the taxation process speaks eloquently for the narrow view of § 216 which amici urge here.

9. At the same time, amici could find no reported cases under § 216 which might provide authority contrary to that set forth above. Cf. United States v. Olster, 14 F. Supp. 623 (M.D. Pa., 1936) and In Re International Corporation Co. 5 F. Supp. 608 (S.D.N.Y. 1934), both decided after the appearance of § 216 but making no mention of that section. In fact, the Olster case involved the quashing of an indictment of a deputy internal revenue collector for divulging information from a tax return because the tax involved (processing tax) was an excise, not an income tax. If § 216 was thought to have a breadth as great as that currently contemplated for § 1905, it seemingly would have provided a valid basis for the indictment.

10. The above description of the legislative history of 18 U.S.C. § 216 (1940) and of its predecessor statutes, along with the Attorney General's opinion and the relevant case law, demonstrate beyond doubt that § 216, and by consequence § 1905, was not meant to extend coverage to information concerning "operations, style of work or appartus" or "income, profits, losses, or expenditures" unless such information came into government possession through the taxing process.